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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of W.L. and T.L.	
W.L., Appellant, v. T.L., Respondent.	G053133 (Super. Ct. No. 15D001297) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Tritt & Tritt and James F. Tritt for Appellant.

Castleton Law Group, May Liou and James B. Green for Respondent.

W.L. (Husband) appeals from the judgment dissolving his marriage to T.L. (Wife). He contends the spousal support award should be reversed because the trial court

failed to consider relevant factors, erroneously denied his motion for new trial, and applied an incorrect analysis in determining the date of separation. We reject Husband's contentions and affirm the judgment.

FACTS

Husband and Wife married in October 2001 and separated in January 2015. They have one minor son (W.L.).

Husband petitioned for divorce in February 2015, alleging a separation date of January 10, 2015. In his income and expense declaration, Husband stated he was a currently disabled production engineer with bachelor's and master's degrees in engineering. He previously worked for The Boeing Company (Boeing) and had a monthly income of $11,645. But he was laid off in January 2015 "following a serious work injury and damage to [his] spine" and now received unemployment compensation. Wife's income and expense declaration indicated she held a bachelor's degree in business administration and finance.

In March, Husband filed an ex-parte request for a domestic violence restraining order. Husband declared he had witnessed Wife scream and slap W.L. on the face, head, neck, and arms when she became enraged. Husband also attested Dr. Gene Bohlmann, a marriage and family therapist, had confirmed the existence of abuse. During therapy, W.L. revealed Wife had "physically assaulted him with a leather belt after chasing him through the house." This resulted in W.L. falling onto and stabbing himself with a pencil he had been holding, which left lead in his chest.

The court denied a temporary restraining order (TRO) but set the matter for a hearing. Husband then filed a request for order (RFO) allowing him to file an amended marriage dissolution petition asserting the date of separation to be June 14, 2014, based on e-mails dated that day between the parties.

At the trial, Joseph Posard, a licensed clinical social worker, testified as follows: He was treating W.L. for clinical depression and anxiety caused by stressors at

home and school. W.L. told Posard he did not trust his mother, who had traumatized him by her "hyper-religiosity . . . , fear of damnation, [and] fear of apocalyptic-type consequences." According to Posard, W.L. was bullied at school and the incidents were made worse by his mother's conduct.[1] Although W.L. initially reported having suicidal ideation, he had improved in that respect. Posard believed W.L. was of sufficient age, intelligence, and maturity to indicate a preference for a custodial parent. W.L. preferred his father and currently wanted no contact with his mother. On cross-examination, Wife asked Posard if he knew W.L. "slept with me for over 12 years?" Back on redirect examination, Posard opined it was not healthy for a 12-year-old pubescent boy to be sleeping with his mother and not in W.L.'s best interests based on developmental research. Wife later clarified W.L. did not sleep with her in the same bed but on the floor in her room.

Husband testified to the following: He previously worked as a mechanical engineer for Boeing. While employed by Boeing, he suffered a herniated disc at work and underwent two surgeries. On June 14, 2014, Husband exchanged e-mails with Wife that he believed established their intent to divorce and legally separate. By then they were already sleeping in separate bedrooms.[2] Three days later, Husband underwent his second spinal surgery. As a result of the surgery, he was bedridden and physically

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[1] The principal at W.L.'s elementary school testified Wife had created problems for W.L. by sending threatening e-mails to her, teachers, the local city council, the police, President Barack Obama, and the California Department of Education. One e-mail said something "about 'burning in hell.'" During a meeting with the principal, Wife mentioned W.L. might bring a knife to school, which caused the school psychologist to conduct a threat assessment. As a result of the threat, a teacher filed a request for a restraining order and a student refused to be in the same class as W.L.

[2] Realtor Lauren Cotner, who appraised the value of the house, testified both parties' rooms had locks on them. The lock on Wife's door made the house feel "like a fortress." Wife slept in the master bedroom and had placed a "kitchen-size refrigerator" in it, and had hung a Hello Kitty towel on her door.

incapable of moving out of the house. He asked Wife to move out, but she claimed she did not have the money to do so. As a result, Husband entered into a stipulation to pay Wife $60,000 to allow her to move out.

After his surgeries, Husband returned to work for a short time at his annual salary of $166,000 before a mass layoff took place at Boeing. He did not know he would be among those laid off, but he received a layoff notice in November 2014. His last day of work was near the end of January 2015.

Husband applied for and received unemployment benefits. He also purchased private health insurance for himself and W.L., and forwarded the information to Wife for her to do the same.

Husband looked for a new job and went on three interviews. At his last interview, he was offered a short-term two-month job at the prorated pay of $8,333 a month, based off an annual salary of $100,000. He initially accepted the job, but then discovered W.L. had suicidal ideations. Husband clarified he meant he found out W.L. had "a couple of knives in his room" and had stated "he was ready to hurt himself by slashing himself." Because of his concern for W.L., Husband decided not to take the job so he could spend time with him.

Although Husband continued to search for employment, he believed the aerospace satellite industry in Southern California was no longer viable. He had not received any responses to his applications.

Wife provided the following testimony: She did not use the $60,000 she received from Husband to move out of the family home. Although she owned a minivan, she used the money to purchase two additional vehicles. She selected an electric car and a recreational vehicle to prepare for "the big trouble" that "we Christian [*sic*] all know . . . is going to happen." The court stated it was "really taken aback by [her] decision to spend [the $60,000] on two cars. That is very troubling."

After the close of testimony, Husband requested a statement of decision. The court ordered his counsel to prepared one for its "review and modification." On the record, the court stated it was going to go through the Family Code section 4320[3] factors before deciding the issue of spousal support and advised counsel to include these statements in the proposed statement of decision. Counsel complied and the court made several modifications to the statement of decision before signing it. Neither Husband nor Wife filed objections to the statement of decision.

The statement of decision listed Husband's separate property and divided the couple's community property. It noted W.L. was afraid of Mother and wanted to live exclusively with Husband. The court awarded Husband sole legal and physical custody of W.L. The court concluded, "The date of separation is January 10, 2015, based upon the declaration in the petition for dissolution."

With respect to the issue of spousal support, the court made the following findings: (1) The parties received an early distribution of $60,000 to secure alternative housing while the family residence was sold, however, Wife purchased two vehicles and did not leave the property; (2) Wife was provided information regarding health insurance and declined to purchase coverage; (3) Wife was intelligent but had not exercised good judgment regarding her future and was "financially insecure;" (4) Husband was "employable, and the court shall impute earning capacity to him in the sum of $8,333 per month"; (5) Wife was "employable" but her earning capacity as a college graduate was impaired by over 13 years of unemployment; (6) the court imputed a minimum wage earning capacity to wife "in the sum of $1,560 per month"; (7) there was no evidence Wife contributed to Husband's education or career during their "marriage of long duration"; (8) Husband left the marriage with "substantial separate assets" that exceeded Wife's assets; (9) both parties had assets that would generate income after the marriage,

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[3] All further statutory references are to the Family Code unless otherwise indicated.

however, Husband was in "a stronger financial position" because of his separate assets; (10) the parties had a middle class lifestyle during the marriage; (11) "Although [Wife] has perpetrated domestic violence as defined in . . . section 6211 toward [W.L.] . . . , the court concludes that the presumption against a spousal support award contained in . . . section 4320[, subdivision] (i) against a perpetrator of domestic abuse is outweighed by the factors in subdivisions (a), (c), (d), (e), (f), and (k) of [section] 4230 to warrant a reasonable order for spousal support for [Wife]"; (12) Wife can "engage in gainful employment without interfering with the minor's needs" because Husband will have sole custody of W.L.; and (13) there is no evidence to suggest Wife was mentally incapacitated or physically unable to find employment.

In the statement of decision, the court stated Wife had a duty pursuant to *Marriage of Gavron* (1988) 203 Cal.App.3d 705, to find employment within "a reasonable period of time." It ordered her to enroll in a health insurance plan "and participate in counseling as recommended." The court ordered Husband to pay Wife $1,750 per month until the death of either party, remarriage, or further order of the court.

Following entry of judgment, Husband moved for a partial new trial on the issues of his earning capacity and the date of separation. The court denied the motion. Husband appealed.

DISCUSSION

I. *Sufficiency of Husband's Notice of Appeal*

At the outset, we note Husband's notice of appeal is purportedly from a judgment dated December 3, 2015. The problem, however, is that no such judgment exists. The judgment of dissolution was entered on November 30, 2015, with notice of its entry served by the clerk on December 1, 2015. The denial of Husband's motion for

new trial occurred on January 15, 2016. And the case summary fails to contain any reference to a judgment filed on December 3, 2015.

Nevertheless, Husband's notice of appeal states he is appealing "from portions of [j]udgment on issues of spousal support, date of separation, denial of motion for partial new trial, and related issues ONLY." We liberally construe the notice of appeal. (Cal. Rules of Court, rule 8.100(a)(2).)[4] "It is axiomatic that notices of appeal will be liberally construed to implement the strong public policy favoring the hearing of appeals on the merits. [Citation.] This policy is especially vital where the faulty notice of appeal engenders no prejudice and causes no confusion concerning the scope of the appeal. [Citation.]" (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 960-961; *Yolo County Dept. of Child Support Services v. Lowery* (2009) 176 Cal.App.4th 1243, 1246 [appellate court liberally construed the notice of appeal to deem it an appeal from the judgment].) Here, we conclude it is appropriate to liberally construe the notice of appeal, filed February 1, 2016, as an appeal from the judgment entered on November 30, 2015. The appeal is timely because Husband's motion for a new trial extended the time to appeal. (Rule 8.108(b)(1)(A).)

II. *Spousal Support Award*

Husband challenges the trial court's spousal support award on several grounds. In addition to maintaining the court failed to weigh and apply all the section 4320 factors, Husband maintains the court considered other improper factors when calculating the award. We will address each claim separately after reviewing the applicable law.

A. *Basic Legal Principles Regarding Spousal Support*

"Spousal support is governed by statute. (See §§ 4300-4360.) In ordering spousal support, the trial court *must* consider and weigh all of the circumstances

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[4] All further rule references are to the California Rules of Court.

enumerated in the statute, to the extent they are relevant to the case before it. [Citations.] The first of the enumerated circumstances, the marital standard of living, is relevant as a reference point against which the other statutory factors are to be weighed. [Citations.] The other statutory factors include: contributions to the supporting spouse's education, training, or career; the supporting spouse's ability to pay; the needs of each party, based on the marital standard of living; the obligations and assets of each party; the duration of the marriage; the opportunity for employment without undue interference with the children's interests; the age and health of the parties; tax consequences; the balance of hardships to the parties; the goal that the supported party be self-supporting within a reasonable period of time; and any other factors deemed just and equitable by the court. (§ 4320, subds. (b)-(l).)" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302-304, fn. omitted (*Cheriton*).)

"'In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it.' [Citation.] In balancing the applicable statutory factors, the trial court has discretion to determine the appropriate weight to accord to each. [Citation.] But the 'court may not be arbitrary; it must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in [the statute], especially reasonable needs and their financial abilities.' [Citation.] Furthermore, the court does not have discretion to ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support. [Citations.]" (*Cheriton, supra*, 92 Cal.App.4th at p. 304.) We apply the abuse of discretion standard in assessing Husband's challenges to the spousal support award. (*Ibid.*)

B. *Analysis of Statutory Factors*

Before addressing Husband's complaints about specific court findings, we will address his assertion the court provided "no analysis" regarding the section 4320 factors. He argues the matter must be reversed because the trial court "essentially listed the factors without weighing or analyzing them on the record." However, Husband devotes the majority of his briefing on appeal to attacking the trial court's analysis of the factors. Specifically, he criticizes the court's discussion of the evidence supporting an earning capacity determination of $100,000, its refusal to impute a higher earning capacity for Wife, its decision Wife's domestic violence was outweighed by other section 4320 factors, and its failure to not give more weight to Wife's assets. In raising these challenges to the court's ruling, Husband has inadvertently explained why his "no analysis" argument lacks merit. We note the majority of Husband's briefing is devoted to attacking the trial court's consideration of the section 4320 factors, supported by ample record citations to the statement of decision and reporter's transcript. In light of above, we conclude there is no merit to the contention the court did nothing more than list the section 4320 factors.

C. *Earning Capacity*

The court imputed earning capacities for Husband and Wife, who were both unemployed. A spouse's ability to pay is a key factor in adjudicating spousal support and involves consideration of both income and assets. (*In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1106.) Generally, spousal support orders are based on the parties' current income because that amount usually reflects a realistic earning capacity. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2017) ¶ 6:858, p. 6-448.) However, section 4320 permits consideration of the supporting spouse's ability to earn. (*Ibid.*; *Cheriton, supra,* 92 Cal.App.4th at p. 308.)

Husband asserts the court's decision to impute an earning capacity of $8,333 per month was improper for the following reasons: (1) it was unreasonably based on evidence he was offered a temporary two-month job; and (2) imputing a large amount

of "phantom income" would not be in W.L.'s best interests. Husband suggests his earning capacity would be closer to $36,000 per year ($3,000 per month). We conclude the court did not abuse its discretion in imputing $8,333 per month to Husband because this decision was amply supported by the record and applicable legal authority.

Husband argues the court improperly focused on one job offer and failed to consider all the other evidence presented on the issue of his earning capacity. Specifically, he maintains the court did not appreciate the job offer was for only two months, his employment prospects were hampered by his worker's compensation injury, his lay off, no other job offers, and his son's emotional needs required his attention. However, the trial transcript reflects these points were all presented to and considered by the court.

The reporter's transcript shows the court repeatedly stated it intended to impute income to Husband. For example, on September 29, 2015, the court provided its tentative thoughts about spousal support after receiving Husband's first proposed judgment (which was before Husband requested a statement of decision). Among other things, the court commented Husband (1) "is an extraordinarily skilled engineer with a long work history that did coincidentally end in a layoff"; (2) admitted returning to work after his disc surgery and working for Boeing, earning $166,000 a year, for some time before being laid off and was then offered a short-term contract based on a $100,000 salary, which showed Husband had marketable skills; (3) "had been offered a job subsequent to his layoff, which he refused to take, not because he was disabled or otherwise incapacitated, but because he was concerned about his son."

In addition, the court noted Husband's discharge summary stated: "'in 12 weeks it is anticipated [Husband] will be 75 percent'"; while he still suffers "some pain with heavy activity[, h]e continues to go to the gym"; Husband had a desire to go back to "'kicking a 60-pound punching bag'" as he did before he was injured but there was some concern of further injury; and Husband's "'rehab potential'" was "'good.'" In light of the

above, it cannot be said the court abused its discretion by failing to consider the evidence presented at trial pertaining to Husband's earning capacity. It is not our province to reweigh the evidence, assess the credibility of witnesses, or substitute our judgment for that of the trial court. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 204.)

As an alternative argument, Husband suggests the court should have recognized that imputing a large earning capacity to him was not in W.L.'s best interests. To support this unusual contention he cites *In re Marriage of Ficke* (2013) 217 Cal.App.4th 10 (*Ficke*). The case is inapt. The appellate court in *Ficke* considered whether the trial court should have imputed income to wife, the custodial parent, when there was no evidence the noncustodial parent needed a "monetary break to increase his visitation time." (*Id.* at p. 22.) The appellate court held, "[T]he trial court abused its discretion in imputing income to the mother without an express finding supported by substantial evidence that the imputation would benefit the children. [Citations.]" (*Id.* at p. 13.) However, the court was discussing *child support*, not spousal support. (*Id.* at p. 22.) "Child support is one thing, spousal support quite another. [Citation.]" (*Ibid.* [a court may impute earning capacity for child support under section 4058 if consistent with child's best interests, whereas, spousal support has no such requirement].)

"Child support and spousal support serve different purposes, implicate different policies, and are governed by different rules. [Citations.]" (*In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1446, fn. 3.) While it is well settled "a spousal support award cannot *undercut* the child support statutes" (*Ficke*, *supra*, 217 Cal.App.4th at p. 23), the child's best interests are *not included* in the list of section 4320 factors.

Moreover, Husband does not explain how imputing a high earning capacity would not be in W.L.'s best interests. Without providing supporting record citations, Husband argues the imputed income would not be in his son's best interests because it would "detract from the support of the minor child by the sole physical and legal custodian" and "undermine the availability of the custodian to a child who has been

damaged by the conduct of the mother." Husband fails to explain how valuing his earning capacity would actually result in less "support" and parental time for W.L. Income is but one of many factors relevant to computing Husband's ability to pay support.

Husband also finds fault with the court's decision to impute a minimum wage earning capacity to Wife. He argues, "[T]he court did not appear to consider [Wife's] qualifications as a potential employee, including the fact that she possessed a bachelor of science degree in business administration and finance" and that she was in good health. We find no abuse of discretion.

The court's statement of decision plainly shows the court considered many factors relating to Wife's earning capacity. The court stated Wife's marketabilty was low because she had been unemployed for over 13 years. (§ 4320, subd. (a)(2).) It recognized Wife had a college education but determined her earning capacity was "impaired." The court acknowledged Wife was physically healthy but ordered her to participate in counseling, recognizing therapy may improve her chances of finding work. Husband does not point to any evidence in the record to support a finding Wife, in her current condition, would be able to secure a higher paying job. In light of the above, we find no merit in Husband's assertion the court abused its discretion regarding Wife's earning capacity.

Alternatively, Husband suggests the court imputed a low earning capacity because it "seemed to adopt the view" the court had the responsibility to protect Wife "from her past and future life choices." Given that this one sentence completes the entire argument, we could say the issue is forfeited because Husband failed to explain how he arrived at the conclusion the court was improperly motivated by a desire to protect Wife. However, later in the briefing, Husband raised the issue again and provided more legal analysis and record references. Accordingly, we cannot say the issue was forfeited but we conclude it lacks merit.

Husband points to several places in the record where the court made statements indicating it intended to assume responsibility for Wife. For example, the court and Wife had a heated exchange at a hearing held to consider the proposed judgment. Wife accused the court of treating her "like an idiot and psycho." The court responded this characterization was untrue but told Wife that it was "seriously concerned about your ability to take care of yourself." The court warned Wife that Husband wanted the court to "cut her off with nothing," and the court believed Wife would quickly spend her share of the community property and "shortly end up penniless and homeless." The court proclaimed, "I am doing whatever I can to protect you from that fate. If, in fact, you can persuade me that this protection is not necessary and you could handle things on your own, I would certainly consider that in making my orders, but so far nothing you have said, either in testimony or in commentary . . . comes close to giving me the assurance that you can take care of yourself."

At another point in the hearing the court stated that because Wife refused to accept responsibility for anything, "the court believes that it should do whatever it can to accept responsibility for you, and even though this is not part of my job in reaching a conclusion in a judgment of dissolution, I think it would be irresponsible of the court to just say in this case, pay her the money, and let her do what she will." The court then questioned Husband's counsel if Wife's money could be placed into an annuity or if any other measures could be taken for her protection.

However, at a subsequent hearing, the court recognized it was not the court's role or Husband's duty to protect Wife from her own poor judgment. After Husband mentioned several possible solutions to address the court's concerns about Wife's future, the court recognized the options suggested were beyond its authority and would only be appropriate if part of a settlement agreement between the parties. When Husband's counsel explained Wife was unwilling to consider a settlement, the court thanked him for his efforts to settle the case and apologized to Husband if he

misunderstood the court's concerns and comments as meaning there would be court orders regarding these issues. It clarified, "A judge really shouldn't be hearing offers to settle. I really shouldn't, but this is, I feel, an unusual case, and I was trying, in my earlier statements, when I suggested that you help [Wife], I was trying to encourage something that might result in a settlement of some issue. [¶] I have failed in that, and so I'm making decisions, but I'm making decisions in accordance with the law, and I cannot make decisions that you would like to see made because you think that this would be helpful to her. I'm just sorry."

To briefly summarize, the record shows the court acknowledged its reasons for being protective of Wife and clarified its ruling would not be made on this basis but "in accordance with the law." The record shows the court's final analysis of the case, which was incorporated by counsel into the statement of decision, was based entirely on its consideration of the appropriate section 4320 factors and nothing more.

D. *Domestic Violence*

The statement of decision contained the court's factual determination Wife emotionally and physically abused W.L. It also summarized the serious ramifications this abuse had on W.L. The court recognized in the statement of decision that the evidence showed W.L. was scared of his mother, did not want further contact with her, required psychotherapy to address his depression and anxiety, and was struggling with thoughts of harming himself. The court also fully appreciated one of the section 4320 factors required the court to consider whether a spouse's history of domestic violence justified denying support.[5] "The facts and equities in a particular case may call for no

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[5] Section 4320, subdivision (i), states one of the circumstances the court must consider in determining whether to award spousal support is "[d]ocumented evidence, including a plea of nolo contendere, of any history of domestic violence, as defined in [s]ection 6211, between the parties or *perpetuated by either party against either party's child*, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and

spousal support or very short-term support. [Citation.]" (*In re Marriage of Schu* (2016) 6 Cal.App.5th 470, 474 [domestic violence proper basis to deny spousal support].)

In the statement of decision, the court concluded support was warranted in this case despite wife's child abuse because this factor was outweighed by the factors in section 4230, subdivisions (a) [each party's earning capacity], (c) [supported party's ability to pay spousal support], (d) [each party's needs], (e) [each party's obligations and assets], (f) [marriage duration], [and] (k) ["balance of the hardships to each party]."

On appeal, Husband asserts the spousal support award must be reversed because the court "erred in failing to analyze and consider" Wife's abuse of W.L. While conceding the statement of decision contains conclusions regarding the abuse, Husband argues that during the trial the court "cut short evidence on that question" based on its misunderstanding of section 4320, subdivision (i). He concludes the court's pronouncement the factor was inapplicable "amounted to a failure to consider relevant evidence" and the court's final ruling in the statement of decision lacked analysis. We find there was no abuse of discretion.

The record shows the court asked Husband's counsel to prepare its statement of decision and discussed each section 4320 factor at the October 9 hearing to assist counsel in that process. The court discussed the factors in the same order they were listed in section 4320. When it reached subdivision (i), the court stated that because the violence "came from the supported party" the factor was inapplicable. Counsel included this incorrect statement of the law in the proposed statement of decision. We can reasonably infer the trial court recognized its mistake because it crossed out this portion of the proposed statement of decision, and handwrote this factor applied but was

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consideration of any history of violence against the supporting party by the supported party." (Italics added.)

outweighed by other factors. Husband did not object to this change or the court's conclusion regarding the domestic violence factor included in the statement of decision.

We note that based on this record, there is nothing to support Husband's claim the court "cut short" his ability to present evidence of child abuse. Rather, the record reflects that in addition to Husband's own testimony regarding the abuse, the court heard from W.L.'s therapist and school principal regarding the issue. There is no reason to infer the court did not consider this evidence because much of the statement of decision included many factual conclusions about W.L.'s abuse and the damage it caused him. We can reasonably infer the court understood the gravity of the situation because it granted Husband sole legal and physical custody of his son. Thus, although the court was initially incorrect in concluding section 4320, subdivision (i), was inapplicable, the record shows the court recognized the error and changed its ruling to reflect it considered this factor before executing the final judgment and supporting statement of decision.

E. Duty to Prudently Invest

Husband asserts the court erred in failing to consider Wife's duty to prudently invest and appropriately use community property assets. He asserts Wife was going to receive as part of the judgment over $760,000 in community property, and for this reason, the court should have given more weight to the fact Wife squandered her advanced payment of $60,000 before trial. Husband concludes he should not be required to make high spousal support payments due to Wife's history of making poor financial decisions. Essentially, his argument is the court should anticipate Wife will misspend her newfound assets rather than investing the money and using the income to support herself. He suggests this probable outcome may unfairly saddle him with higher support payments for a longer duration. We find no error for two reasons.

First, a supported spouse's level of fiscal responsibility is not one of the section 4320 factors the court is required to consider. As mentioned above, the trial court correctly recognized it would be inappropriate to order remedies intended to protect Wife

from her own poor judgment. Second, the argument is speculative. The court cannot award spousal support based on the mere hypothesis Wife will mismanage her large award of community property assets. After all, she has a college degree in business administration and finance. And the trial court found no evidence she was mentally incapacitated.

We find it telling that Husband cites legal authority holding a supported spouse's poor management of assets are relevant factors when a trial court is considering whether to *terminate* spousal support. (*In re Marriage of Terry* (2000) 80 Cal.App.4th 921, 928 [terminating spousal support]; *In re Marriage of McElwee* (1988) 197 Cal.App.3d 902, 908 [terminating spousal support].) Here, the trial court was making an initial support order. We conclude it would have been premature for the court to have denied Wife all spousal support on the grounds she *might* mismanage her assets.

III. Motion for Partial New Trial

Husband asserts the court erroneously denied his motion for a partial new trial based on newly discovered evidence. The last day of trial was October 9, 2015. On October 22, 2015, Husband met with orthopedist, Dr. Lincoln Yee, as required for his workers' compensation case. Yee's report stated he met with Husband because he was asked to prepare a qualified medical evaluation. After meeting with Husband for two hours to go over his medical history and perform an examination, Yee concluded Husband was 64 percent permanently disabled.

Husband received a copy of the report on November 24, 2015. The court filed the final judgment and statement of decision on November 30, 2015. Ten days later, Husband filed a motion for a partial new trial on the issues of imputed income and date of separation. With respect to the issue of income, Husband asserted the court should hold a new trial on the issue of his earning capacity based on the newly obtained evidence he received an official disability rating. He reminded the court that it imputed a $100,000

earning capacity after rejecting Husband's request that the court *assume* he was disabled. Husband concluded this new evidence conclusively proved his disability status.

The court denied the motion on the following grounds: (1) Husband knew there would be an independent medical exam in his workers' compensation case and "Yee was known [to Husband] before we started trial"; (2) Husband's counsel pushed to have the trial completed promptly but should have either asked for a continuance to wait for Yee's evaluation or called Yee as a witness; (3) the report did not change the court's opinion Husband would be able to find work and receive an income. On this final point, the court stated, "As to the issue of imputed income to your client, the court considered all of the medical information that you had given and weighed that medical information against the fact that [Husband] was offered a job, which he declined to accept, even after he had sustained the injury that he claimed was disabled. I just wasn't persuaded. And I just am not persuaded now that you are entitled, under the law, to a new trial on that issue of imputation of income."

Code of Civil Procedure section 657 provides: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 4. Newly discovered evidence, material for the party making the application, which he *could not, with reasonable diligence, have discovered and produced at the trial*." (Italics added.)

"A motion for a new trial on the grounds of newly discovered evidence is a matter which is committed to the sound discretion of the trial court. All presumptions are in favor of the order made by the trial court, and a reviewing court will not interfere unless a clear abuse of discretion is shown. [Citation.]" (*Cansdale v. Board of Administration* (1976) 59 Cal.App.3d 656, 667.)

We recognize the record shows Husband met Yee for the first time after the trial was completed and neither Yee nor his report were available in time for trial. The trial court misspoke in this respect. However, we conclude the trial court properly recognized Husband failed to address why a continuance was not feasible under the circumstances, especially because Husband's appointment with Yee was scheduled for the same month as the trial. Nor did Husband explain below, or on appeal, why he could not ask a treating physician or other medical expert to testify about the nature of his disability. Husband's injury was not newly discovered evidence. To the contrary, it was undisputed Husband's workers' compensation case started long before the marital dissolution trial.

In any event, it cannot be said the court abused its discretion in light of the final reason it gave for denying the motion. The court reminded Husband it was familiar with the nature of his injury and employment history, but there was no evidence he was unemployable. It was undisputed he was offered a job but turned it down for personal reasons. The court simply imputed an earning capacity for Husband because he was currently unemployed. Nothing in Yee's report refutes this conclusion. Yee did not determine Husband was 100 percent disabled or unable to work in any capacity.

Husband's suggestion the disability rating should reduce his earning capacity to $36,000 is unsupported by any evidence or legal authority. It appears to be based on a simplistic mathematical calculation of subtracting 64 percent from $100,000 (representing the imputed earning capacity). Husband fails to appreciate a person's income is not necessarily measured by physical abilities, but is also dependent on a person's qualifications, training, and experience. We conclude Husband failed to show how Yee's report contradicted the court's finding he was employable despite his injuries. In light of all of the above, we conclude the court did not abuse its discretion in ruling a new trial on the issue of imputed income was not warranted.

IV. Separation Date

Husband challenges the court's determination of January 10, 2015, as the date of separation, claiming June 14, 2014, is the correct date. We find no abuse of discretion.

"Date of separation is a factual issue to be determined by a preponderance of the evidence. [Citation.] 'Our review is limited to determining whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.' [Citation.]" (*In re Marriage of Manfer* (2006) 144 Cal.App.4th 925, 930.)

We begin our analysis by noting our review of the trial court's ruling is somewhat complicated by some changes in the law regarding the date of separation since the court made its finding in November 2015. Specifically, in July 2015 the California Supreme Court issued an opinion, *In re Marriage of Davis* (2015) 61 Cal.4th 846, 865 (*Davis*), which announced a bright-line rule that a couple was not "'living separate and apart'" under the statute while they continued to live under one roof. The opinion prompted the Legislature to abrogate the rule announced in *Davis* and make other changes and additions to the Family Code that became effective on January 1, 2017. (§ 70.) Simply stated, the Legislature added a definition of "date of separation" and directions for determining it. (*Ibid.*)

Relevant to our analysis, the new statutory definition and the old test predating *Davis* are essentially the same. Before the *Davis* opinion, the following test was used by trial courts: "[T]he date of separation occurs when either of the parties *does not* intend to resume the marriage *and* his or her actions bespeak the finality of the marital relationship. There must be problems that have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed and there is no reasonable possibility of eliminating, correcting or resolving these problems. [Citations.]" (*In re Marriage of Hardin* (1995) 38 Cal.App.4th 448, 451.) "*The ultimate question to be decided in determining the date of separation is whether either or both of*

the parties perceived the rift in their relationship as final. The best evidence of this is *their words and actions*. The husband's and the wife's subjective intents are to be objectively determined from all of the evidence reflecting the parties' words and actions during the disputed time in order to ascertain when during that period the rift in the parties' relationship was final." (*Id.* at p. 453, fn. omitted.) When considering the date of separation, "No particular facts are per se determinative. The ultimate test is the parties' subjective intent and all evidence relating to it is to be objectively considered by the court." (*Id.* at p. 452.)

This same global approach in deciding the date of separation was incorporated into the statutory definition abrogating the *Davis* opinion. Section 70 provides: "(a) 'Date of separation' means the date that a complete and final break in the marital relationship has occurred, as evidenced by *both* of the following: [¶] (1) The spouse has expressed to the other spouse his or her intent to end the marriage. [¶] (2) The conduct of the spouse is consistent with his or her intent to end the marriage. [¶] (b) In determining the date of separation, the court shall take into consideration all relevant evidence." (Italics added.)

Although the trial court was operating under the *Davis* rules when the trial took place at the end of 2015, the record indicates it applied the pre-*Davis* rules and considered evidence of the spouses' expressed intent, conduct, and other relevant evidence when it determined the date of separation. Rather than focusing only on the fact Husband and Wife were living in the same residence, the record shows the court considered Husband's claim June 14 was the date of separation due to an e-mail exchange occurring that day. The court reviewed the evidence and concluded the e-mails did not show an intent to separate. It construed the e-mails as "correspondence between two people who are angry with one another, who are apparently handling their personal financial business within an e-mail rather than within a conversation. But the only thing that even references a dissolution action is a reference to a legal separation in [Wife's]

first communication, and it says, in that regard, 'I will go ahead, ask my attorney to contact you to move out and for the legal separation to release my pressure to stay under one roof with you.' [¶] And then [Husband] responds, 'You can go ahead and have your attorney contact me or proceed with the divorce. You also have the option to move out yourself.'" The court stated it had "read the entire correspondence and [did] not find an agreement that June 14[], 2014 is a date of separation, nor do I believe that from the content of these documents I can reasonably infer that these parties intended to separate on June 14[], 2014. So, therefore, the only date of separation that I have . . . is the January 10th day that was filed with the filing of the petition."

The record supports this analysis. Wife's e-mail mentioned only a legal separation, which does not sever "marital bonds." (*Irvin v. Contra Costa County Employees' Retirement Association* (2017) 13 Cal.App.5th 162, 168 [legal separation leaves "'marriage bonds intact'" and "[o]nly a subsequent divorce can 'terminate[] the marital status of the parties'"].) And, Husband's e-mail merely said Wife could "proceed with the divorce"—not that *he intended* to end the marriage on June 14, 2014. Under section 70, subdivision (a)(1), neither spouse "expressed to the other spouse his or her intent to end the marriage." On appeal, Husband fails to point to any other evidence showing he expressed his intent to end the marriage before filing his petition to dissolve the marriage.

We are not persuaded by Husband's argument June 14 is the date of separation because the parties circumstances did not change between June 14, 2014, and January 10, 2015. He argues, "it logically follows" that if there was no change in status the initial separation date must be June 14. This is speculation not logic. We could infer this six-month period maintaining the status quo meant parties did not intend to, and were not yet ready to end their marriage. Their status did not change until Husband petitioned for divorce in February 2015 and designated January 10, 2015, as the date of separation (a date Wife did not dispute).

Similarly, we find no merit to Husband's argument the court erred in cutting off evidence regarding the separation date. If we assumed this was true for the sake of argument, the argument nevertheless fails because Husband does not suggest what further evidence he would have provided. Moreover, the record reference he provided to support his argument referred to the testimony of forensic accountant Joel Danenhauer regarding his creation of the two balance sheets for each of the possible dates of separation—not evidence related to the date of separation itself. In light of all of the above, we conclude the trial court acted within its discretion in determining that January 10, 2015, not June 14, 2014, to be the date of separation.

DISPOSITION

The judgment is affirmed. Respondent shall recover her costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.